Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., et. al. Complainants, v. GULF POWER COMPANY, Respondent.	E.B. Docket No. 04-381

To: Office of the Secretary

Attn.: The Honorable Richard L. Sippel
Chief Administrative Law Judge

GULF POWER'S MOTION TO RECONSIDER
LIMITED PORTIONS OF SECOND DISCOVERY ORDER

Gulf Power Company ("Gulf Power") respectfully requests that the Presiding Judge reconsider the rulings in the Second Discovery Order with respect to complainants' second request for production numbers 8, 14 and 15. In support of this motion, Gulf Power says the following:

Second Request No. 8

This request sought documents relating to "Gulf Power's upgrades, modernization, strengthening or replacement of poles containing Complainants' attachments from 1998." Gulf Power objected on grounds that this request is overly broad, unduly burdensome, vague, and

seeks information which is irrelevant to the hearing issues. The Second Discovery Order states: "Complainants argue convincingly that evidence of 'upgrades, modernization, strengthening or replacement of poles' is relevant to the issue of Gulf Power's pole capacity." (Second Discovery Order, p. 4). But aside from the vague "it's relevant to pole capacity" argument, the only argument offered by complainants is that such documents are "probative evidence of Gulf Power's custom of following the utility industry practice of strengthening and replacing poles whenever necessary to provide capacity for new attachments." (Second Motion to Compel, p. 9). This is not at issue in this case. See 47 C.F.R. § 1.325(a) (limiting scope document discovery to evidence "which is relevant to the hearing issues"); see also Fed. R. Civ. P. 34(a) (limiting scope of document discovery to matters "relevant to the claim or defense of any party"). Even if it was an issue, it is not an issue in dispute since Gulf Power repeatedly has admitted its historical willingness to accommodate attachers by performing make ready. See, e.g., Harris v. Duty Free Shoppers Ltd, 940 F.2d 1272, 1276 (9th Cir. 1991) (holding that plaintiff's stipulation to facts precluded further discovery before ruling on summary judgment motion); In re Property Tech. Ltd., 296 B.R. 701, 706 (E.D. Va. 2002) (holding that stipulation to facts for purposes of summary judgment while discovery was still ongoing precluded additional discovery on those stipulated facts); Arford v. Miller, 239 B.R. 698, 702 (denying claimant's request for addition discovery because "in the prior Bankruptcy proceeding, they stipulated that all relevant facts were mutually agreed upon").

In addition to seeking proof on an irrelevant (or undisputed) point, this request also is unduly burdensome – apparently to the complainants themselves. This request asks for all of Gulf Power's make ready documents since 1998. Complainants made essentially the same request in their first document request when they sought all documents relating to "the

performance of make ready work, from January 1, 1998 to the present." (First Request For Production No. 4). This request was part of complainants' first motion to compel, to which the Presiding Judge opined:

> Request No. 4 is a broad and burdensome request. The "make ready orders" sought by Complainants were earlier made available for inspection at various locations and Complainants declined to inspect. Gulf Power continues to extend the invitation. Therefore, Complainants have effectively waived any right to having those document sought out and produced by Gulf Power.

(First Discovery Order, p. 19).[1] The only change in the status quo since the First Discovery Order is that complainants declined to "inspect documents offered for inspection by Gulf Power" before "filing any further Motion to Compel Production of Documents." (First Discovery Order, p. 21). Gulf Power requests that the Presiding Judge, upon reconsideration, deny complainants' motion to compel further response to Second Request No. 8.

Second Request No. 14

This request sought documents referring to sources "from which Gulf Power has obtained new poles, from 1998 through the present, in order to change-out poles containing Complainants' attachments." Gulf Power objected on grounds that this request seeks information which is not relevant to the hearing issues. The Second Discovery Order states:

> If there is evidence of an inordinately tight supply of poles (present and/or future), that condition might inflate the rent paid by CATV cable attachers. Since poles relate to an element of cost, Gulf Power's objection to Request No. 14 is denied because pole availability could expand potential capacity and thereby effect "full capacity."

[1] The First Discovery Order also provided that future document discovery "should be limited to documents which are reasonably expected to be used in depositions or in cross-examination of key witnesses, and which have not already been produced." (First Discovery Order, p. 20). Second Request No. 8 meets none of these conditions.

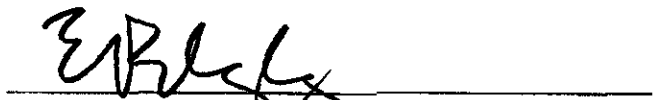
(Second Discovery Order, p. 5). There are two points here which need to be addressed. First, the market conditions which drive bare pole cost are not at issue in this case. See 47 C.F.R. § 1.325(a) (limiting scope document discovery to evidence "which is relevant to the hearing issues"); see also Fed. R. Civ. P. 34(a) (limiting scope of document discovery to matters "relevant to the claim or defense of any party"). Neither party is claiming that the bare cost of a pole, for the purposes of any rate calculation, is inflated, deflated or otherwise wrong. Second, Gulf Power has never contended (and does not contend here) that "pole availability" affects expansion of capacity. If the Presiding Judge is accepting complainants' legal argument that the ability to expand capacity eviscerates "full capacity" under *Alabama Power v. FCC*, then Gulf Power would never be able to meet its burden since virtually *any* pole can be changed out. Gulf Power requests that the Presiding Judge, upon reconsideration, deny complainants' motion to compel further response to Second Request No. 14.

Second Request No. 15

This request sought "all documents, including maps, diagrams, or schematics, which existed prior to Gulf Power's retention of its consultant Osmose . . . that depict the specific Gulf Power poles . . . at 'full capacity.'" Gulf Power originally responded by stating that all such documents were made available during the May 27-28, 2005 document review. Gulf Power's supplemental response, served contemporaneously with this motion, further identifies the specific group of documents responsive to this request (the maps within the 1996 and 2001 pole count documents). But the Second Discovery Order appears to require more than this (and more than complainants have sought):

> Here it is best to identify "maps, diagrams or schematics" that depict poles holding Complainants' attachments, regardless of "full capacity." Then, identify those poles that Gulf Power contends are at "full capacity." That can be done by color scheme or some such method of depicting poles holding Complainants' CATV cables that are alleged to be at "full capacity." Or utilizing a pre-existing schematic universe of poles, Gulf Power could circle the poles that it contends are at "full capacity."

(Second Discovery Order, p. 5). This part of the order appears to require creation of a document that did not "exist[] prior to Gulf Power's retention of its consultant Osmose." (Second Request For Production No. 15). This is not what complainants are seeking. Complainants are asking: "Prior to the Osmose audit, did you have any maps depicting 'full capacity' poles?" The answer to that question is "yes," but as Gulf Power clarified in its response to the second motion to compel, "[i]f complainants are looking for maps which designate specific poles at 'full capacity,' there are no such maps." (Response to Second Motion to Compel, p. 6). Even if complainants were asking for what the Second Discovery Order appears to require, they would not be entitled to it since it requires Gulf Power to create a document that does not exist. See Rockwell Int'l Corp. v. H. Wolfe Iron & Metal Co., 576 F. Supp. 511, 513 (W.D. Pa. 1983) ("Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection, but can be used only to require the production of things in existence."); see also Sonnino v. Univ. Kansas Hosp. Auth., 220 F.R.D. 633, 640 (D. Kan. 2004) ("The Court cannot compel a party to produce documents that do not exist or that are not in that party's possession, custody, or control."). Gulf Power requests that the Presiding Judge, upon reconsideration, require nothing more than already provided in Gulf Power's supplemental responses to Second Request No. 15.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Reconsider Limited Portions Of Second Discovery Order has been served upon the following by Electronic Mail and by United States Mail on this the 30th day of September, 2005:

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